

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN T., A Minor by His Parents and	:	CIVIL ACTION
Next Friends, Paul T. and Joan T., and	:	
PAUL T. AND JOAN T., Individually and	:	
on Their Own Behalf	:	
	:	
	:	
v.	:	
	:	
THE DELAWARE COUNTY INTERMEDIATE UNIT,	:	
AND THE COMMONWEALTH OF PENNSYLVANIA	:	No. 98-5781

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

August 22, 2003

A. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In 1998, the parents of a young boy with Down's Syndrome sued defendant Delaware County Intermediate Unit ("DCIU"). Alleging the DCIU failed to provide mandated special education services to John T. at St. Denis, a private Catholic school, plaintiffs brought claims under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. ("IDEA"), § 504 of the Rehabilitation Act, 29 U.S.C. § 794, 24 Pa. Cons. Stat. § 9-972.1 ("Act 89"), and 24 Pa. Cons. Stat. § 13-1372(4) ("13-1372(4)"); plaintiffs sought declaratory, injunctive, and compensatory relief, including preliminary and permanent injunctions compelling the DCIU to provide speech therapy, occupational

therapy, itinerant teaching services,¹ and a teacher's aide.²

By Opinion and Order dated May 8, 2000, the court issued a preliminary injunction requiring the DCIU to provide John T. with special educational services at St. Denis. See John T. v. Delaware County Intermediate Unit, 2000 U.S. Dist. LEXIS 6169 (E.D. Pa. May 8, 2000) (John T. I). The DCIU appealed the preliminary injunction, but following a second order by the court compelling the DCIU to comply under penalty of sanctions for contempt, the appeal was withdrawn.

In the Fall and Summer of 2000, plaintiffs and the DCIU worked to develop a suitable Individualized Education Program ("IEP") for John T. During the process, the DCIU concluded that John T. required a "life skills class," unavailable at St. Denis, and issued a Notice of Recommended Assignment ("NORA"), proposing that John T. move to a public school within the Haverford Township School District. John T.'s parents, refusing to approve the NORA, argued that the DCIU's recommendation conflicted with the court's mandate that services be provided at St. Denis.

Plaintiffs sought and obtained a state administrative due process hearing. A Pennsylvania Special Education Hearing Officer issued an order in favor of John T. and the DCIU

¹ An itinerant teacher, by consulting with a child's classroom teacher, aids the classroom teacher in modifying the regular education curriculum to teach the child.

² A teacher's aide is a one-on-one assistant working directly with the child, full time, to help the child perform in a mainstream classroom.

appealed. Before the reviewing panel issued its ruling,³ however, this court ordered the DCIU to show cause why it should not be held in contempt for failing to comply with the preliminary injunction.

The court considered written submissions regarding the contempt from both parties, conducted an evidentiary hearing, and heard oral argument. John T. and his parents alleged that the DCIU had violated the preliminary injunction order by: 1) failing to provide an aide and itinerant teacher from May 8, 2000 until the end of the school year; 2) failing to provide services during the first two-three weeks of the 2000-01 school year; 3) telling St. Denis that all services to other children would be cut as a result of the obligations to John T. imposed on the the DCIU by this court; and 4) failing to provide the services at levels reasonably calculated to afford meaningful educational progress throughout the 2000-01 school year.

On September 4, 2001, the court entered an order finding the DCIU in civil contempt of the preliminary injunction for failing to provide John with an itinerant teacher or teacher's aide during the month of September, 2000. See Order, Sept. 4, 2001. The contempt order required the DCIU to pay John T. \$1100.00 to compensate him for providing services in September, 2000, at his own expense. Id. The court did not find contempt on any other

³On March 15, 2001, the Hearing Officer's order was reversed by the Pennsylvania Special Education Due Process Appeals Review Panel.

basis alleged by plaintiffs. Id. Defendant immediately appealed the contempt order.

Before commencement of the 2001-2002 school year, plaintiffs and the DCIU developed a mutually agreeable IEP; having achieved the primary objective of their litigation, plaintiffs moved for voluntarily dismissal of their claims under Fed. R. Civ. Pro. 41(a)(2) and, arguing John T. was a "prevailing party" under the fee shifting provision of the IDEA, attorney's fees of \$136,172.79, see 20 U.S.C. § 1415(i)(3)(B). In an Opinion and Order dated November 7, 2001, the court granted the motion for voluntary dismissal but denied the request for attorney's fees. See John T. v. Delaware County Intermediate Unit, 2001 U.S. Dist. LEXIS 18254 (E.D. Pa. Nov. 7, 2001) (John T. II). John T. timely appealed the court's refusal to award attorney's fees.

The Court of Appeals affirmed. See John T. v. Delaware County Intermediate Unit, 318F.3d 545 (3d Cir. 2003).

We will affirm the District Court's Contempt Order. The District Court's finding that the DCIU was in contempt is sufficiently supported. ...

We will also affirm the District Court's denial of the petition for attorney's fees. Under J.O. [v. Orange Twp. Bd. of Educ.], 287 F.3d 267 (3d Cir. 2002)] and Buckhannon [Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources], 532 U.S. 598 (2001)], which we apply expressly to the IDEA fee shifting provision, John T. is not a 'prevailing party' by virtue of his having obtained the Preliminary Injunction, the Contempt Order or the acceptable IEP.

Id. at 561. As the court explained, "[P]laintiffs may be

considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Id. at 555 (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)). Though the Court of Appeals noted that a stipulated settlement could confer prevailing party status under certain circumstances, it concluded that none of the three forms of relief achieved by John T.-the preliminary injunction, the contempt order and the satisfactory IEP-served as the basis for conferring such status. Id. at 558.

Following the Court of Appeals' affirmance of the contempt order, plaintiffs moved the court to determine counsel fees specific to the contempt proceedings. The court denied plaintiffs' motion seeking more than \$95,000 in fees and costs "without prejudice to the filing of a new motion directed only at the Motion for Contempt and with proper itemization." Order, June 12, 2003. Plaintiffs' amended motion to determine fees is the subject of this memorandum.

B. THE AMENDED PETITION

In his amended petition to determine counsel fees, plaintiffs' counsel, Dennis C. McAndrews, Esquire ("McAndrews"), submits that the hours attributable to the activities necessary to litigate the issue of contempt before this court, and obtain appellate affirmance of the contempt determination, total 121.11,

or \$30,346.33 in fees. Amend. Pet. to Det. Fees, Exhibit B, 10. Additional costs incurred, such as courier service and postage, total \$862.87. Id. at 11. In all, McAndrews asks the court to award \$31,209.20. Id.

In support of the fee award, McAndrews submits an affidavit affirming that the time detailed in Exhibit B was spent engaged in work directly related to the contempt proceedings and that "these hours are fair and reasonable under the circumstances of the case." Affid. in Supp. of Awd., 2. Also provided are the hourly rates charged by McAndrews, his associate(s)⁴ and for paralegal services, together with changes to these rates during litigation of this action.⁵ McAndrews avers his hourly rates are fair and reasonable. Id. at 3.

C. ANSWER TO AMENDED PETITION

The DCIU seeks to have the fee petition denied in its entirety or reduced.

⁴A second attorney was hired during the course of the litigation.

⁵During the calendar year 2000, the rates were as follows:

McAndrews - \$250.00 per hour
Heidi Konkler, Esq. - \$ 125.00 per hour
Paralegal Services - \$75.00 per hour

During the calendar year 2001, the rates increased to:

McAndrews - \$275.00 per hour
Heidi Konkler, Esq. - \$ 150.00 per hour
Paralegal Services - \$80.00 per hour

During the calendar years 2002 and 2003, the rates increased to:

McAndrews - \$300.00 per hour
Marcie Romberher, Esq. - \$250.00 per hour
Heidi Konkler, Esq. - \$ 170.00 per hour
Paralegal Services - \$95.00 per hour

The DCIU first argues that the amended petition fails to comport with the directives of the court at the June 11, 2003 hearing regarding the initial fee petition. The DCIU claims that more than half of the entries in the amended petition are for services beyond the scope of the categories enumerated by the court.

Regarding McAndrews' method of detailing hours, the DCIU claims that counsel has lumped together multiple legal services in so-called "block entries," making it difficult to award for one service and not another that might be unrelated to the contempt. Where the court is unable to discern the part of these "block entries" relating to contempt, the DCIU argues, the entire entry should be excluded from consideration and no fees awarded.

The DCIU next argues that McAndrews cannot recover fees for portions of the contempt proceedings in which he was unsuccessful. Plaintiffs were successful on one allegation of contempt only; the burden is on plaintiffs' counsel to adjust its claim for fees based on the degree of success. See Hensley, 461 U.S. at 437. The DCIU argues McAndrews did not even make a reasonable attempt to separate out charges for his unsuccessful claims.

Fees for ambiguous costs are not properly recoverable. With few exceptions, McAndrews has claimed \$862.87 in costs for services like "Sir Lancelot," filing charges, transcripts and

bulk postage absent justification; the DCIU asserts that the charges have not been explained and should not be awarded.

Finally, the DCIU claims that McAndrews' hourly rates are excessive and unreasonable. In support of this contention, defendant attaches an affidavit of an attorney, practicing in the same area of the law, stating that the prevailing rate is \$150 per hour, not the \$300.00 per hour currently charged by McAndrews. Ans. to Amend. Pet., Exhibit D (Coll Affidavit).

D. DISCUSSION

Plaintiffs' counsel is entitled to recover reasonable attorney's fees for securing the contempt adjudication on behalf of John T. and his parents. See Halderman v. Pennhurst State School and Hospital, 49 F.3d 939, 941 (3d Cir. 1995). To demonstrate reasonableness, counsel must submit evidence to support his assertion as to the number of hours expended and the rate claimed. Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990). The burden then shifts to the opposing party to challenge, with specificity, the reasonableness of the request (though not each individual entry). The court has considerable discretion in fixing the fee amount in light of the objections. Bell v. United Princeton Properties, Inc., 884 F.2d 713, 721 (3d Cir. 1989). Degree of success is the critical factor to consider in determining the reasonableness of the award. See Farrar v. Hobby, 506 U.S. 103, 114 (1992).

As an initial matter, the court finds that the hourly rates charged by McAndrews and his firm are reasonable. McAndrews is an experienced attorney with superior knowledge of special education matters and disability law; his rates are consistent with other attorneys of comparable skill in Southeastern Pennsylvania. See Amend. Pet. to Det. Fees, Exhibit G (Stotland Affidavit).

The transcript of the June 11, 2003 hearing, held to consider the initial fee petition, makes clear that McAndrews was directed by the court to include in an amended petition only charges related to the following: 1) preparation of the initial petition for contempt; 2) review of the DCIU's answer to the petition; 3) attendance at the contempt hearing; 4) preparation of post-hearing memo; 5) reading of the Sept. 4, 2001 order; and, 6) briefing and arguing the contempt fee issue on appeal. Trans. June 11, 2003, 5.

McAndrews is also entitled to fees for time spent preparing the instant amended petition, but not the original motion and petition previously denied by the court.

The DCIU objects that much of McAndrews' amended petition comprises matters beyond the scope of those categories listed above and that McAndrews' method of detailing hours, lumping together multiple legal services into "block entries," makes it difficult to discern which services are related to contempt. The

court agrees the amended petition is not without ambiguity.

For example, entries such as "review of correspondence from Mike Levin" or "phone communication with client," identify nothing about the purposes of the review or communication or their relation to the contempt proceedings. In addition, entries like those made on January 10 and 11, 2002—"prepare memo" and "preparation of memo"—do not denote on which memo McAndrews and his associates expended their time. Even where the amended petition specifies "preparation of memo for the Third Circuit," McAndrews has still failed to comply with the court's directive since two memos were submitted to the Court of Appeals, only one relevant to contempt.

Regarding McAndrews' method of detailing hours, the DCIU is correct that a "block entry" system renders awarding fees for one service, but not another possibly unrelated to the contempt, difficult if not impossible. For example, the amended petition includes the following entry for February 7, 2001:

Preparation of materials for contempt hearing
Delivery of materials to Federal Court
Preparation of correspondence to Mike Levin
Telephone communication with client

2.25 Hours at a rate of \$275.00 hour.

Amend. Pet. to Det. Fees, Exhibit B, 2. The billing rate reveals that it was McAndrews, and not an associate, who completed the

tasks described above; however, the entry does not sufficiently break down the amount of time expended on each task. If two (2) of the 2.25 hours were spent delivering materials to court, the court would not award \$550.00 in fees to McAndrews for an errand easily delegated to someone earning substantially less money.

Because the amended petition fails to comply with the court's directive of June 11, 2003, McAndrews' request for attorney's fees will be reduced by thirty percent (30%).

The DCIU's argument regarding McAndrews' failure to reduce his fee request based on his degree of success also entitles defendant to a reduction in the total award. Plaintiffs alleged contempt on four grounds; the court found that plaintiffs had proved by clear and convincing evidence only one of those bases. See Order, Sept. 4, 2001.

At the June 11, 2003, hearing, the court recognized "that it may be hard to parse out how much of your appellate brief is on one and how much on the other," Trans. June 11, 2003, 5, but directed McAndrews to make an attempt to do so. Because counsel failed to do so in his amended petition, the request for fees will be reduced by an additional thirty percent (30%). The resulting fee award is fair and reasonable in view of the \$1,100 award obtained for his client, John T., and is consistent with the court's order of September 4, 2001, affirmed by the Court of Appeals.

The costs requested by McAndrews are fair and reasonable. The court accepts as true the averments in McAndrews' affidavit that these costs are related to litigation of the contempt issue.

McAndrews is entitled to recover 40% of his requested attorney's fees (\$12,138.53), plus all costs claimed (\$862.87), a total of \$13,001.40.

An appropriate order follows.

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Next Friends, Paul T. and Joan T., and	:	
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on Their Own Behalf	:	
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v.	:	
	:	
THE DELAWARE COUNTY INTERMEDIATE UNIT,	:	
AND THE COMMONWEALTH OF PENNSYLVANIA	:	No. 98-5781

ORDER

AND NOW, this 22nd day of August, 2003, upon consideration of Amended Motion to Determine Counsel Fees Following Affirmance of Contempt Adjudication (paper #95), Answer to Plaintiffs' Amended Motion (paper #96), and Transcript of Hearing Held June 11, 2003 (paper #97), and for the reasons stated in the preceding memorandum, it is hereby **ORDERED** that:

1. The Amended Motion to Determine Counsel Fees Following Affirmance of Contempt Adjudication (paper #95) is **GRANTED IN PART** and **DENIED IN PART**:

a. The request for attorney's fees will be reduced by sixty percent 60%, to \$12,138.53;

b. The request for costs in the amount of \$862.87 is granted.

Plaintiffs' counsel is entitled to recover a total of \$13,0001.40 in fees and costs.

S.J.